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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 458

DR. HENRY L. PECKHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 8a-9a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 14, 1955 (Pet. App. 10a). A petition for rehearing was denied on August 31, 1955 (Pet. App. 10a). On September 30, 1955, Mr. Justice Black extended the time for filing a petition for a

writ of certiorari to and including October 10, 1955 (Pet. App. 11a), and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the District of Columbia abortion statute, 22 D.C. Code (1951) 201, was properly construed by the district court and the court of appeals for that circuit as not requiring proof that the woman involved was in fact pregnant.

STATUTE INVOLVED

22 D. C. Code 201 provides:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

STATEMENT

Petitioner was convicted of procuring an abortion in violation of 22 D. C. Code (1951) 201, and was sentenced to imprisonment for twenty months to five years. The indictment alleged that the woman upon whom the abortion was performed was then pregnant (Pet. App. 1a). The government

introduced proof to such effect which petitioner attempted to refute (Pet. App. 2a-5a). The trial court ruled, however, that, under the District of Columbia statute, the question of pregnancy was immaterial; that if the jury should believe beyond a reasonable doubt that petitioner was convinced that the complaining witness was pregnant, then the crime would be completed if he administered a drug or used an instrument with intent to commit an abortion (Pet. App. 7a). The judge so instructed the jury (Pet. App. 7a). On appeal, the court of appeals held that the trial court was correct in its construction of the statute (Pet. App. 8a-9a).

ARGUMENT

Petitioner's contention—that the Court of Appeals for the District of Columbia Circuit misconstrued the local District of Columbia abortion statute—presents no issue calling for review by this Court. It is well established that, with respect to local issues, the Court of Appeals for the District of Columbia Circuit acts in the capacity of the highest court of a state. In such matters, the policy of this Court "is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed." *Fisher* v. *United States*, 328 U. S. 463, 476.

The interpretation of the statute by the courts below is clearly not "egregious error." As the opinion below points out, the statute in effect before 1901 had used the phrase "any woman in any

condition of pregnancy."[1] Section 809 of the 1901 Code, like the statute presently involved, simply refers to "any woman." Before 1901, a similar change in English statutes had been held to render immaterial the fact of actual pregnancy. *Regina* v. *Goodall,* 2 Cox Crim. Cases 41 (1846); *Regina* v. *Titley,* 14 Cox Crim. Cases 502 (1880). Thereafter various American states amended their criminal laws with respect to abortion in conformity with the English law. State statutes which use the phrase "any woman" have been widely interpreted, in accordance with the English cases, as not requiring proof of pregnancy. *Commonwealth* v. *Taylor,* 132 Mass. 261 (1882); *Eggart* v. *State,* 40 Fla. 527, 533 (1898); *People* v. *Ramsey,* 83 Cal. App. 2d 707, 717 (1948); *State* v. *Snyder,* 188 Iowa 1150, 1154 (1920); *Commonwealth* v. *Longwell,* 79 Pa. Sup. 68, 72 (1922).

Petitioner argues (Pet. 13, 15) that the 1951 District of Columbia statute should not be read in the same way because there is a reference to "child" in the latter part of the statute providing

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[1] Act of January 19, 1872, *Compiled Statutes,* Abert and Lovejoy, 1894, Ch. XVI, Sec. 13, provided:

"Any person who shall administer, or cause to be administered, *to any woman in any condition of pregnancy,* any medicine, drug, substance, or thing whatsoever, with the intention thereby to produce a miscarriage by any such woman, or to prevent her from giving birth to the child with which she may be pregnant, or shall use on any such woman any instruments, or any other means for said purposes, shall, in the case of the death of said woman by any of said substance or means, or in the case of said child therefrom, be guilty of manslaughter * * *." [Emphasis supplied.]

for a heavier penalty "if the woman or her child dies in consequence of such act."[2] But if, as petitioner argues (Pet. 13), any abortion of a pregnant women must result in the death of a "child" as that term was used in the statute, then there is even greater reason for interpreting the provision for a lesser penalty as not requiring proof that there was a "child" in existence.[3]

The courts below had ample precedent for their interpretation of the statute. And even if the question were closer than it is, the principle announced by this Court in the *Fisher* case, 328 U.S. at 476, would apply: when "the choice of the Court of Appeals of the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere."

The fact that petitioner, with some basis in dictum in a prior decision,[4] may have thought that the statute would be otherwise interpreted does not establish that he was deprived of a fair trial or the effective assistance of counsel. A court is certainly not required to decide a question before it in accordance with the manner in which an accused has prepared his defense. The fact that

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[2] The present statute, as amended by the Act of June 29, 1953, 67 Stat. 93, refers to the death of "the mother".

[3] Petitioner was sentenced under the lesser penalty.

[4] In *Crichton* v. *United States*, 92 F. 2d 224 (C.A. D.C.), certiorari denied, 302 U.S. 702, where the issue was whether the indictment had to negative the proposition that the miscarriage was necessary to preserve the life of the mother, the court of appeals assumed that pregnancy was necessary. The same assumption was made at petitioner's prior trial. See *Peckham* v. *United States*, 210 F. 2d 693, 700.

the issue of pregnancy was held immaterial did not vitiate petitioner's defense (Pet. 11). Petitioner took the stand in his own defense and denied committing an abortion upon the complaining witness (R. 259-271). The court's ruling merely took from the jury as immaterial one issue which petitioner thought would be submitted. This is not a prejudicial variance. Cf. *Ford* v. *United States,* 273 U. S. 593, 602.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

NOVEMBER 1955.

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